SILVER CONCEPT SDN BHD

v.

BRISDALE RASA DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: W-02-555-2000]
14 MAY 2005

CONTRACT: *Sale and purchase of land - Conditional contract - Purchaser sought to terminate agreement on the ground that condition precedent not fulfilled - Whether purchaser bound by undertaking to fulfil condition - Whether condition could not be fulfilled due to frustration of contract - Whether purchaser in breach of contract - Whether damages for breach allowed under agreement - Whether agreed liquidated damages a penalty clause*

CONTRACT: *Sale and purchase of land - Breach of agreement - Claim for specific performance and damages for breach of contract in lieu of - Whether seller could maintain claim*

The appellant partially appealed against the quantum of damages awarded in the High Court below whilst the respondent cross-appealed to reverse the findings of liability, award of damages and costs made in favour of the appellant. The facts showed that the appellant and the respondent entered into a sale and purchase agreement ('the agreement') whereby the appellant agreed to sell 397.2 acres of land ('the land') and the respondent agreed to purchase it for a total purchase price of RM75,468,000. The respondent paid a 10% deposit of RM7,546,800 upon the execution of the agreement and a further sum of RM17,921,200 to the appellant at a later date. The respondent was required to pay the balance by 30 September 1997 which was extended to 31 December 1997 pursuant to cl. 4.2 of the agreement. There were three conditions to be fulfilled under the agreement in which only the third condition need be mentioned, namely, that the approval of its holding company called Brisdale Holdings Sdn Bhd ('Brisdale Holdings') was required to be obtained. It followed that Brisdale Holdings refused to give its approval and the respondent sought to end the agreement and request a refund of all monies paid thus far to the appellant on the ground that the third condition could not be fulfilled. The appellant replied that since the respondent had given an undertaking under cl. 2.1 (b) of the agreement to obtain the requisite approval,

it was in breach of the agreement and so gave notice to remedy the breach within 30 days. The respondent then commenced proceedings in the High Court, *inter alia*, for a declaration that the agreement was terminated. The appellant counter-claimed, *inter alia*, for specific performance of the agreement. The trial judge dismissed the respondent's claim and entered judgment on the appellant's counter-claim. He ordered forfeiture of the 10% deposit in favour of the appellant and awarded damages of RM415,147.35 with interest at 8% per annum from the date of judgment to date of realization. Hence, this appeal. The issues that arose for determination, *inter alia*, were: (1) whether the respondent was bound by its undertaking given under cl. 2.1 (b) of the agreement to fulfil the third condition; (2) whether there was frustration of the contract; and (3) whether the claim for damages was within agreed liquidated damages under cl. 10.1 of the agreement.

Held (allowing appellant's partial appeal and dismissing respondent's cross-appeal)

Per Abdul Kadir Sulaiman JCA (majority):

[1] The word "including" appearing in cl. 2.1(b) of the agreement was a term of extension. It imported addition. It added to the subject matter already comprised in the definition. The undertaking given by the respondent was in respect of obtaining approvals of both its own shareholders and that of Brisdale Holdings, its holding company. The undertaking given by the respondent was plain and clear and there was no ambiguity. It was an undisputed fact that both parties had legal representation in the drafting of the agreement and the respondent gave the express undertaking with the benefit of legal advice. The respondent could not resile from its undertaking given to the appellant. The failure to obtain the approval was a clear breach of the express undertaking given in cl. 2.1(b) of the agreement and therefore the respondent was in breach of the agreement. (pp 274 b-d & 276 g)

[2] The respondent's submission that it had done everything required in order to obtain the approval of the shareholders of Brisdale Holdings was rejected. No step was taken by the respondent to advise the shareholders of the holding company of the likely consequence of the breach of the undertaking already given by it to the appellant in the agreement. (p 276 b-c)

[3] The only reason given and reliance placed by the respondent to bring the agreement to an end was that the third condition precedent was not fulfilled. The respondent could not as an afterthought invent or advance another reason as to why it sought to bring the agreement to an end at the material time in question. (p 278 c)

[4] The foundation and subject matter of the contract was the sale and purchase of the land. The character of the land remained the same. There was no supervening event that significantly changed the nature of the land. It had not become radically different from that which was undertaken by the agreement. The fact that the respondent was unable to obtain a loan to pay the balance of the purchase price did not have the effect of frustrating the agreement. The trial judge correctly addressed and guided himself to the settled authorities on the law of frustration and came to a correct finding that the agreement was not frustrated. (pp 279 d-e & 280 c)

[5] The appellant all along maintained its claim for specific performance right up to the conclusion of the trial and never abandoned it. The appellant was at all material times ready, able and willing to carry out and perform its entire obligations under the agreement. At the end of the trial it was the court that decided not to grant the appellant an order of specific performance as sought for. A party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract was a perfectly usual claim. As such, there was no inconsistency in the appellant maintaining a claim for specific performance and also seeking damages *in lieu* of specific performance. In contracts for sale of land, a party in a suit must put forward all its claims in one and the same cause of action. (pp 281 f-h & 282 a-e)

[6] Clause 10.1 of the agreement covered any breach by the respondent of any of the provisions of the agreement. The word 'any' should be interpreted to mean all, each and every or whichever. Where the respondent committed any breach of the agreement and if the breach was not remedied, the appellant was entitled to invoke cl. 10.1 of the agreement and should be entitled to forfeit the 10% deposit. It could also claim a further sum equivalent to 11% per annum on the 3rd instalment or portion thereof remaining unpaid (as per cl. 4.2 of the agreement) calculated from the due date until the date of such forfeiture by way of agreed liquidated damages. (p 284 a-b)

[7] The 'due date' was the date the appellant issued the notice to the respondent to pay the balance of the purchase price. That notice was dated 29 December 1997. Under cl. 4.1 and 4.2 of the agreement, the completion date was 30 September 1997. There was an automatic extension of a further three months under cl. 4.2 of the agreement whereupon the respondent was liable to pay the appellant interest at the rate of 11% per annum on the 3rd instalment or portion thereof remaining unpaid.

Therefore, in accordance with the terms of agreement, the due date was 30 September 1997 and not 29 December 1997. The appellant at all material times sought specific performance of the agreement until the trial judge ordered forfeiture of the deposit on 22 July 2000. Therefore, the phrase "until the date of such forfeiture" in cl. 10.1 of the agreement could only be on 22 July 2000. Accordingly, the due date was on 30 September 1997 and "until the date of such forfeiture" was 22 July 2000. It followed that the basis upon which the trial judge determined the "due date" and the "date of forfeiture" and consequently the amount of damages of RM415,147.35 could not be supported in law. (pp 284 c-h & 285 a)

[8] A party who attacks a liquidated damages clause as a penalty is in fact asking the court to relieve him from his contractual obligations which he freely undertook in exchange for good consideration. The courts would therefore generally preserve the sanctity of the contract freely entered into by the parties. (p 285 g)

[9] An agreed sum is a penalty only if it is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered. In the present appeal, the respondent failed to demonstrate that the agreed sum was a penalty. The parties entered the agreement with the benefit of legal advice and freely bargained and agreed upon the formula of damages stipulated in cl. 10 of the agreement as agreed liquidated damages. Therefore, the agreed liquidated damages provision in cl. 10 of the agreement was not a penalty clause. The sanctity of the contract freely entered into by the parties should be preserved. Accordingly, interest calculated at 11% per annum on the 3rd instalment sum of RM45,280,800 from 30 September 1997 till 22 July 2000 was RM14,001,071. (pp 286 b & 287 b-d)

Per Tengku Baharudin Shah JCA (dissenting):

[1] The conditions precedent in cl. 2.1(a), (b) and (c) of the agreement express the clear intention of the parties to bind themselves to the obligation thereunder only if and when all the stipulated approvals were obtained. The specified conditions incorporated legal and statutory requirements that must be satisfied before the sale and purchase of the land constituted a valid and enforceable transaction. Both parties had the benefit of expert legal advice in drawing up the agreement and knew very well that the non-fulfilment of those conditions would not only render the said transaction void but also expose their directors to legal sanction. Inevitably, neither party intended to be bound to perform its obligations under the

agreement unless and until those conditions were fulfilled. As the condition precedent in cl. 2.1(b) was not fulfilled, the transaction *ipso facto* came to an end. (pp 297 g-h & 298 a-b)

[2] Notwithstanding any undertaking given, any precondition not fulfilled would still render the agreement unenforceable. A breach of undertaking to fulfil any such condition would not revive or restore the void agreement. The words "which the Purchaser hereby undertakes to obtain" within a bracket inconspicuously hidden in cl. 2(b) of the agreement could not be construed to govern and supersede the very substance of the condition itself, *ie*, obtaining the approval of the shareholders of the respondent. It followed that frustration was no longer an issue. (p 298 f-h)

[3] It would be absurd to construe the undertaking given to exclude the approval of the shareholders of Brisdale Holdings which was the holding company of the respondent. It went without saying that Brisdale Holdings were also shareholders of the respondent. As such, the word "including" in that cl. 2.1 (b) was really superfluous. This was apart from the fact that it was a statutory requirement that the shareholders of a company must approve such substantial disposal or acquisition of property (see s. 132C Companies Act 1965). (p 299 b-c)

[4] The undertaking in cl. 2.1(b) of the agreement could not be construed as a guarantee. No subsidiary company has the capacity to give such a guarantee. More so in this case where the parent company was a public company whose shareholders were free to vote as they pleased. By the word "undertake", the respondent was merely making itself responsible for, accepting an obligation or affirming that it would take the necessary actions to get the approval and nothing more. The respondent had no control or even any say over the votes of the shareholders of its public company. (p 299 d-h)

[5] It was not true that the undertaking given by the respondent was the basis for the parties to enter into the agreement. If it were so, the relevant clause would not be hidden so inconspicuously within brackets in one of the provisions pertaining to conditions precedent when it should be in one of the 7 preambles or the 28 clauses of the 44-page agreement. (p 300 b)

[6] As a wholly owned subsidiary company, the respondent had no control nor could it possibly have any influence over the shareholders of its holding company Brisdale Holdings, a public company. Such condition was also caught by s. 37 of the Contracts Act 1950 that makes an agreement contingent on an impossible event void. It was therefore not the intention of the parties to have such an ineffective and unenforceable clause incorporated in the agreement. In any event even if it was a valid undertaking a breach of such an undertaking would still nullify the contract as the condition precedent was not fulfilled. There was thus no merit in the appellant's claim for breach of undertaking. (p 300 g-h)

[Damages awarded by trial judge in the sum of RM415,147.35 substituted with sum of RM14,001,071 with interest at 8% per annum to be calculated from 23 July 2000 until date of full realization.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu merayu sebahagiannya terhadap kuantum ganti rugi yang diawadkan oleh Mahkamah Tinggi di bawah manakala responden membuat rayuan balas untuk mengakaskan dapatan liabiliti, awad ganti rugi dan kos yang dibuat berpihak perayu. Fakta-fakta menunjukkan bahawa perayu dan responden memasuki suatu perjanjian jual beli ('perjanjian tersebut') di mana perayu bersetuju menjual 397.2 ekar tanah ('tanah tersebut') dan responden bersetuju membelinya untuk harga jualan RM75,468,000. Responden membayar deposit sebanyak RM7,546,000 semasa pelaksanaan perjanjian tersebut dan selepas itu membayar jumlah sebanyak RM17,921,200 kepada perayu pada suatu tarikh kemudian. Responden dikehendaki membayar baki sebelum 30 September 1997 yang kemudiannya dilanjutkan kepada 31 Disember 1997 mengikut kl. 4.2 perjanjian tersebut. Terdapat tiga syarat terdahulu untuk dipenuhi di mana syarat tiga sahaja yang patut disebutkan, iaitu, kelulusan syarikat pemegangnya iaitu Brisdale Holdings Sdn Bhd ('Brisdale Holdings') diperlukan untuk diperolehi. Ianya mengikut bahawa Brisdale Holdings enggan memberi kelulusannya dan responden cuba menamatkan perjanjian tersebut dan meminta bayaran balik semua wang yang diberikan kepada perayu atas alasan syarat tiga tersebut tidak dipenuhi. Perayu menjawab bahawa oleh kerana responden telah memberi jaminan di bawah kl. 2.1 (b) perjanjian tersebut untuk mendapatkan kelulusan berkenaan, maka ia telah memungkiri perjanjian tersebut dan notis diberikan untuk memperbaikinya dalam masa 30 hari. Responden kemudiannya memulakan prosiding di Mahkamah Tinggi, *inter alia*, untuk suatu deklarasi yang perjanjian tersebut ditamatkan. Perayu membuat tuntutan balas, *inter alia*, untuk pelaksanaan spesifik perjanjian tersebut. Hakim bicara menolak tuntutan responden dan memasuki penghakiman atas tuntutan balas perayu.

Beliau membuat perintah merampas deposit 10% itu berpihak perayu dan mengawadkan ganti rugi sebanyak RM415,147.35 dengan bunga pada kadar 8% setahun dari tarikh penghakiman kepada tarikh dikeluarkan. Maka, rayuan ini. Isu-isu yang berbangkit, *inter alia*, ialah: (1) sama ada responden terikat dengan jaminannya itu di bawah kl. 2.1 (b) perjanjian tersebut untuk memenuhi syarat tiga tersebut: (2) sama ada terdapat kekecewaan kontrak; and (3) sama ada tuntutan untuk ganti rugi adalah dalam lingkungan ganti rugi jumlah tertentu yang dipersetujui di bawah kl. 10.1 perjanjian tersebut.

Diputuskan (membenarkan rayuan sebahagian perayu dan menolak rayuan balas responden)
Oleh Abdul Kadir Sulaiman HMR (majoriti):

[1] Perkataan "including" dalam kl. 2.1 (b) perjanjian tersebut ialah suatu terma sambungan. Perkataan tersebut menyiratkan tambahan. Perkataan tersebut menambah subjek perkara yang sudah terkandung di dalam definasi klausa tersebut. Jaminan yang diberi responden berkaitan dengan perolehan kelulusan kedua-dua pemegang sahamnya dan juga Brisdale Holdings yang merupakan syarikat pemegangnya. Jaminan tersebut jelas dan terang dan tidak ada ketaksaan. Ia fakta yang tidak dipertikaikan bahawa kedua-dua parti telah mendapat perwakilan undang-undang dalam mendrafkan perjanjian tersebut dan responden telah memberi jaminan jelas dengan faedah nasihat di sisi undang-undang. Responden tidak boleh menarik diri dari jaminan yang diberikan kepada perayu. Kegagalan memperolehi kelulusan tersebut jelas kemungkiran jaminan ternyata yang diberi di bawah kl. 2.1 (b) perjanjian tersebut. Dengan itu responden telah mungkir perjanjian tersebut.

[2] Hujahan responden bahawa ia telah membuat semua yang sepatutnya untuk memperolehi kelulusan pemegang-pemegang saham Brisdale Holdings ditolak. Tiada langkah yang diambilnya untuk menasihati pemegang-pemegang syer syarikat pemegang mengenai kesan yang mungkin berlaku jika jaminan yang diberikan perayu dimungkiri.

[3] Jawapan yang hanya diberikan dan digantung oleh responden untuk menamatkan perjanjian tersebut ialah bahawa syarat tiga tersebut tidak dipenuhi. Responden tidak boleh sebagai suatu fikiran selepas, reka atau kemukakan sebab yang lain kenapa ia cuba menamatkan perjanjian tersebut pada masa berkenaan.

[4] Dasar dan subjek perkara kontrak ialah jual beli tanah tersebut. Keadaan tanah tersebut masih sama. Tiada kejadian berlaku yang mengubah keadaan tanah tersebut. Tanah tersebut tidak menjadi sesuatu yang lain daripada yang dijaminkan di bawah perjanjian tersebut. Lagi, fakta bahawa responden tidak dapat memperolehi pinjaman untuk membayar baki harga jualan tidak mengecewakan perjanjian tersebut. Hakim bicara dengan betul mengalamatkan dan membimbing dirinya kepada autoriti-autoriti yang ditetapkan atas undang-undang kekecewaan kontrak dan sampai kepada dapatan yang betul bahawa perjanjian tersebut tidak dikecewakan.

[5] Perayu selalunya mengekalkan tuntutannya untuk pelaksanaan spesifik sehingga akhir perbicaraan. Perayu selalunya pada masa-masa material bersedia, mampu dan ingin untuk melaksanakan semua obligasi-obligasinya di bawah perjanjian tersebut. Pada akhir perbicaraan, mahkamah yang memutuskan untuk tidak memberi perayu perintah pelaksanaan spesifik seperti yang dipohonnya. Tuntutan sesuatu parti untuk pelaksanaan spesifik perjanjian tersebut bersama tuntutan lanjut atau alternatif untuk ganti rugi kemungkiran kontrak ialah tuntutan yang amat biasa. Maka, tiada ketidaksejajaran perayu mengekalkan tuntutan untuk pelaksanaan spesifik dan juga untuk ganti rugi sebagai ganti pelaksanaan spesifik. Di dalam kontrak-kontrak jual beli tanah, parti berkenaan dalam suatu guaman mesti mengemukakan semua tuntutan dalam satu dan kausa tindakan yang sama.

[6] Klausa 10.1 perjanjian tersebut merangkumi apa-apa kemungkiran responden atas mana-mana peruntukan-peruntukan perjanjian tersebut. Perkataan "any" patut ditafsirkan untuk bermakna semua, masing-masing dan setiap atau manapun. Di mana responden melakukan apa-apa kemungkiran perjanjian tersebut dan kemungkiran tersebut tidak diperbaiki, perayu berhak untuk bertindak atas kl. 10.1 perjanjian tersebut dan merampas 10% deposit itu. Ia juga boleh menuntut jumlah selanjutnya bersamaan sebanyak 11% setahun atas ansuran tiga atau bahagiannya yang belum dibayar (mengikut kl. 4.1 perjanjian tersebut) dikira dari tarikh dijangka sehingga tarikh dirampas deposit melalui ganti rugi jumlah tertentu yang dipersetujui.

[7] Tarikh dijangka ialah tarikh perayu mengeluarkan notis kepada responden untuk membayar baki harga jualan. Notis bertarikh 29 Disember 1997. Di bawah kl. 4.1 dan 4.2 perjanjian tersebut, tarikh siap ialah 30 September 1997. Ada lanjutan automatik tiga bulan lagi di bawah kl. 4.2 perjanjian tersebut di mana responden bertanggungan membayar perayu bunga sekadar 11% setahun atas ansuran tiga atau bahagiannya yang belum dibayar. Dengan itu, mengikut terma-terma perjanjian tersebut, tarikh dijangka ialah

30 September 1997 dan bukan 29 Disember 1997. Perayu selalunya pada masa-masa material memohon pelaksanaan spesifik perjanjian tersebut sehingga hakim bicara membuat perintah merampas deposit pada 22 Julai 2000. Maka, frasa "until the date of such forfeiture" dalam kl. 10.1 perjanjian tersebut semestinya pada 22 Julai 2000. Oleh kerana itu alasan atas mana hakim bicara menentukan "due date" dan "date of forfeiture" dan sebagai akibatnya amaun ganti rugi RM415,147.35 tidak boleh dipertahankan di sisi undang-undang.

[8] Sesuatu parti yang menentang satu klausa ganti rugi jumlah tertentu sebagai satu penalti sebenarnya meminta mahkamah untuk melepaskannya daripada obligasi-obligasi kontraktualnya di mana ia dengan bebas mengambil atas ganti balasan yang baik.

[9] Sesuatu jumlah yang dipersetujui hanya menjadi penalti jika ia berlebihan, terlampau atau tidak berpatutan dengan kerugian yang dialami. Dalam rayuan semasa, responden gagal untuk menunjukkan jumlah yang dipersetujui adalah satu penalti. Parti-parti memasuki perjanjian tersebut dengan faedah nasihat undang-undang dan bebas tawar menawar dan setuju atas fomula ganti rugi yang dinyatakan di dalam kl. 10 perjanjian tersebut sebagai ganti rugi jumlah tertentu yang di persetujui. Maka, ganti rugi jumlah tertentu yang dipersetujui di bawah kl. 10.1 perjanjian tersebut bukan suatu klausa penalti. Kesucian kontrak yang bebas dimasuki oleh parti-parti patut dikekalkan. Oleh kerana itu, bunga dikira pada 11% setahun atas ansuran tiga jumlah RM45,280,800 dari 30 September 1997 sehingga 22 Julai 2000 ialah RM14,001,071.

Oleh Tengku Baharudin Shah HMR (bertentangan):

[1] Syarat-syarat terdahulu kl. 2.1 (a), (b) dan (c) perjanjian tersebut menunjukkan maksud jelas parti-parti untuk diikatkan dengan obligasi di bawah syarat-syarat tersebut hanya apabila dan jika semua kelulusan-kelulusan yang dinyatakan diperolehi. Syarat-syarat khusus tersebut memasukkan kehendak-kehendak undang-undang dan statutori yang mesti dipenuhkan sebelum jual beli tanah tersebut menjadi transaksi yang sah dan yang boleh dikuatkuasakan. Kedua-dua parti mendapat faedah pakar nasihat undang-undang apabila membuat perjanjian tersebut dan jelas mengetahui bahawa ketidakcapaian syarat-syarat tersebut akan mengakibatkan bukan sahaja transaksi tak sah tetapi juga akan mendedahkan pengarah-pengarah mereka kepada sanksi di sisi undang-

undang. Ternyata bahawa kedua-dua parti tidak bermaksud untuk terikat melaksanakan obligasi-obligasi masing-masing di bawah perjanjian tersebut hanya kecuali jika syarat-syarat tersebut dipenuhi. Oleh kerana syarat terdahulu kl. 2.1 (b) tidak dipenuhi, transaksi *ipso facto* ditamatkan.

[2] Meskipun apa-apa jaminan yang diberikan, apa-apa syarat yang tidak dipenuhi masih akan menjadikan penjanjian tidak boleh dikuatkuasakan. Kemungkiran jaminan memenuhi apa-apa syarat sebegitu tidak akan menghidupkan atau mengembalikan perjanjian yang tak sah. Perkataan-perkataan "which the Purchaser hereby undertakes to obtain" dalam lingkungan tersembunyi yang tidak ketara di kl. 2.1(b) perjanjian tersebut tidak boleh ditafsir untuk mengawal dan menggantikan syarat itu sendiri, iaitu, memperolehi kelulusan pemegang-pemegang saham responden. Ianya mengikut bahawa kekecewaan kontrak bukan satu isu lagi.

[3] Ianya mustahil untuk mentafsir jaminan yang diberikan untuk mengecualikan kelulusan pemegang-pemegang saham Brisdale Holdings yang merupakan syarikat pemegang responden. Tidak perlu dinyatakan bahawa Brisdale Holdings pemegang-pemegang saham responden. Maka, perkataan "including" di dalam kl. 2.1 (b) itu lebih daripada yang diperlukan. Ini selain daripada fakta kehendak statutori yang pemegang-pemegang saham suatu syarikat mesti meluluskan pelupusan atau perolehan harta benda yang banyak (lihat s. 132C Akta Syarikat 1965).

[4] Jaminan di dalam kl. 2.1 (b) perjanjian tersebut tidak boleh ditafsirkan sebagai gerenti. Tiada anak syarikat yang mempunyai kebolehan untuk memberi gerenti sebegitu. Lebih lagi di dalam kes semasa di mana syarikat induk ialah sebuah syarikat awam di mana pemegang-pemegang saham bebas untuk mengundi dengan sukarela. Dengan perkataan "undertake", responden hanya bertanggungjawab untuk terima obligasi atau mengesahkan mengambil tindakan-tindakan sewajarnya untuk memperolehi kelulusan dan bukan lebih dari itu. Responden tidak mempunyai kawalan atau apa-apa hak bersuara atas undi-undi pemegang-pemegang saham syarikat awamnya.

[5] Ianya tidak benar bahawa jaminan yang diberi responden merupakan sebab parti-parti memasuki perjanjian tersebut. Jika ianya demikian, klausa berkenaan tidak akan tersembunyi dalam lingkungan kurungan salah satu peruntukan berkaitan syarat-syarat terdahulu di mana ia sepatutnya berada di dalam salah satu mukadimah-mukadimah atau 28 klausa-klausa dalam 44 mukasurat perjanjian tersebut.

[6] Sebagai satu anak syarikat yang dimiliki sepenuhnya, responden tidak ada kawalan atau apa-apa pengaruh atas pemegang-pemegang saham syarikat pemegangnya iaitu Brisdale Holdings, satu syarikat awam. Syarat sebegitu juga tertangkap oleh s. 37 Akta Kontrak 1950 yang membuat suatu perjanjian tak sah jika tertakluk kepada suatu syarat yang mustahil dipenuhi. Dengan itu ianya bukan maksud parti-parti berkenaan untuk memasukkan suatu klausa yang tidak berkesan dan yang tidak boleh dikuatkuasakan di dalam perjanjian tersebut. Jikapun ianya suatu jaminan yang sah, kemungkiran jaminan sebegitu masih akan mentaksahkan kontrak disebabkan syarat terdahulu tidak dipenuhi. Maka, tiada merit dalam tuntutan perayu untuk kemungkiran jaminan.

Ganti rugi oleh hakim bicara dalam jumlah RM415,147.35 digantikan dengan jumlah RM14,001,071 dengan kadar bunga 8% setahun dikira dari 23 July 2000 sehingga tarikh dikeluarkan penuh.]

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] MLJ 47 ***(refd)***

AC Patel v. Vishwanath AIR 1954 Bombay 204 ***(refd)***

Aerlinte Eireann Teoranto v. Cananda (Minister of Transport) [1990] 68 DLR (4th) 220 ***(refd)***

Affin Credit (Malaysia) Sdn Bhd v. Yao Yuen Fui [1984] 1 MLJ 69 ***(refd)***

Ardeshir v. Flora Sassoon [1928] AIR 208 PC ***(refd)***

Beihai Zingong Property Development Co & Anor v. Ng Choon Meng [1999] 3 SLR 283 ***(refd)***

Brisdale Rasa Development Sdn Bhd v. Silver Concept Sdn Bhd & Anor [2001] 1 AMR 1087 HC ***(refd)***

Chung Khiaw Bank v. Hotel Rasa Sayang Sdn Bhd [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Davis Contractors Ltd v. Fareham UDC [1956] AC 696 ***(refd)***

Esanda Finance Corporation Ltd v. Plessnig & Anor [1989] 84 ALR 99 ***(refd)***

Esley v. JG Collins Insurance Agencies Ltd [1978] 83 DLR (3d) 1 ***(refd)***

Hipgrave v. Case [1885] 28 Ch D 356 ***(refd)***

Ibrahim Ismail & Anor v. Hasnah Puteh Imat [2004] 1 CLJ 797 CA ***(refd)***

John Crocother Group v. Carpet International [1990] BCLC 460 ***(refd)***

Kim Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 MLJ 256 ***(refd)***

Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd [2002] 1 CLJ 261 CA ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(dist)***

Neylon v. Dickens [1987] 1 NZLR 402 ***(foll)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Property & Bloodstock v. Emerton [1968] 1 Ch 94 ***(refd)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 CA ***(refd)***
Ramli Zakaria & Ors v. Government Of Malaysia [1983] CLJ 158; [1983] CLJ (Rep) 282 HC ***(refd)***
Schuler (L) Ag v. Wickman Machine Tools Sales Ltd [1974] AC 235 ***(refd)***
SM James & Anor v. Dr. Abdul Khair AIR [1961] Patna 242 ***(refd)***
Souster v. Epsom Plumbing Contractors Ltd [1974] 2 NZLR 515 ***(refd)***
Tan Meng San v. Lim Kim Swee [1962] 28 MLJ 174 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 ***(refd)***
The Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd AIR [1965] SC 1288 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1996] 1 MLJ 661 ***(refd)***
Universal Corporation v. Five Ways Properties Ltd [1979] 1 All ER 552 ***(refd)***
Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 15, 16
Companies Act 1965, s. 132C
Contracts Act 1950, ss. 33(a), (b), 36(1), 57, 75

For the appellant - VK Lingam (VK Lakshmi with him); M/s VK Lingam & Co
For the respondent - KS Narayanan (Joginder Singh, CT Annathurai, Logan Sabapathy, A Vishnu Kumar & Tharminder Singh with him); M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:

In this appeal before us, the appellant, Silver Concept Sdn Bhd, had partially appealed against the low quantum of damages awarded in the High Court below. The respondent, Brisdale Rasa Development Sdn Bhd had cross-appealed to this court to reverse the findings of liability, award of damages and costs that was made in favour of the appellant by the High Court on 22 July 2000. The judgment of the High Court was reported in [2001] 1 AMR 1087. We had on 5 May 2005 allowed the appellant's appeal with costs and dismissed the respondent's cross-appeal, also with costs. We now give our reasons for doing so.

Brief Facts

It is necessary for us to state the brief facts of this appeal. The appellant is a landowner. The respondent is a property developer. The parties entered into a sale and purchase agreement on 31 March 1997 whereby the appellant agreed to sell 397.2 acres of land (the said land) and the respondent agreed to purchase the said land for a total purchase price of RM75,468,000 upon the terms and conditions contained in the agreement.

The 10% deposit of RM7,546,000 was paid by the respondent to the appellant upon the execution of the agreement. On 30 June 1997 the respondent paid a further sum of RM17,921,200 to the appellant's solicitors as stakeholders making a total paid so far of RM25,467,200 leaving a balance of RM50,000,800 remaining to be paid. The respondent was required to pay this balance of RM50,000,800 by the extended completion date. The completion date of the agreement was extended from 30 September 1997 to 31 December 1997 pursuant to clause 4.2 of the agreement.

There were three conditions precedent to be fulfilled under the agreement. The first was the approval of the FIC which was duly obtained on 10 July 1997. The second was the approval of the shareholders of Promto Properties Sdn Bhd and Promto Berhad, the immediate holding and the ultimate holding company of the appellant respectively which was also duly obtained on 31 May 1997. In this case Promto Berhad was a public listed company. The third condition precedent was the approval of the shareholders of Brisdale Holdings Berhad, the ultimate holding company of the respondent. This third condition precedent was not fulfilled as the shareholders of Brisdale Holdings Berhad had at the extraordinary general meeting (EGM) held on 23 December 1997 refused to give their approval for the purchase of the said land by the respondent pursuant to the agreement. In this case Brisdale Holdings Berhad was also a public listed company.

The respondent's solicitors had in a letter dated 24 December 1997 informed the appellant solicitors that since this third condition precedent had not been fulfilled the agreement between the appellant and the respondent was at an end and requested the appellant to refund all monies paid by the respondent under the agreement. The appellant solicitors replied by letters dated 26 December 1997 and 29 December 1997 stating that the respondent had given an undertaking under clause 2.1(b) of the agreement to obtain the approval of the shareholders of Brisdale Holdings Berhad and therefore the respondent was in breach of the term of the agreement and gave notice to the respondent to remedy the breach within 30 days.

The respondent then commenced proceedings in the High Court below claiming various reliefs against the appellant. The respondent, *inter alia*, claimed for a declaration that the contract was terminated *ipso facto* on non fulfilment of the condition precedent and sought refund of all monies paid to the appellant. The respondent also sought a further and/or alternative prayer that the said contract has been frustrated and consequently the respondent is discharged from its obligations to perform the contract.

The appellant in turn filed a counter-claim against the respondent and sought, *inter alia*, a declaration that the said contract has not been frustrated and claimed for an order of specific performance of the contract and damages in addition to the order of specific performance and/or damages for breach of the contract in lieu of specific performance. The counter-claim of the appellant also includes a claim for damages for breach of undertaking given by the respondent to the appellant in the contract to obtain the approval of the shareholders of Brisdale Holdings Berhad.

After a full trial the learned judge dismissed the respondent's claims. He entered judgment on the appellant's counter-claim. He ordered the forfeiture of the 10% deposit of RM7,546,800 in favour of the appellant and awarded the appellant damages of RM415,147.35 with interest at 8% per annum from the date of judgment to date of realization.

Before us in this appeal, we invited the respondent's counsel to address us first as it was a cross appeal by the respondent on liability and damages. The respondent in their cross-appeal before us attacked the trial judge's decision to dismiss the respondent's claims on several grounds. We do not find it necessary to deal with all the grounds raised before us. We find that the grounds that merit our consideration in this judgment are the issues of the undertaking under clause 2.1(b) of the agreement, the issue of frustration of the contract, the issue of the appellant's claims in the pleadings and the agreed liquidated damages under clause 10.1 of the agreement.

The Undertaking In Clause 2.1(b) Of The Agreement

On the issue of the undertaking, the respondent's counsel submitted that the undertaking given by the respondent in clause 2.1(b) of the agreement was only limited to the approval of its shareholders which is a subsidiary of Brisdale Holdings Berhad. Such an undertaking does not extend to obtaining approval of the shareholders of its holding company, which is a public listed company. He submitted that the respondent as a subsidiary company cannot give an undertaking as to the manner in which the shareholders of the holding company are to vote.

Counsel for the appellant, on the other hand, submitted that the respondent's witness Mr Yap Hui Kun who was the Senior General Manager of Finance of Brisdale Holdings Berhad had testified at the trial that the respondent had in fact given the undertaking to obtain the approval of the shareholders of Brisdale Holdings Berhad. He also stated that counsel for the respondent had also submitted to the trial judge that the respondent had given the undertaking to obtain the approval of the shareholders of Brisdale Holdings Berhad. The appellant's counsel argued that the respondent is bound by their admissions made in the court below and he urged upon us to reject the respondent's argument presently put before us. We do not agree with the appellant's counsel submission as it involves issue of law in relation to the construction of a contract.

The construction of a contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below. In *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96 at 103 and 104 this court had held as follows:

> It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.
>
> As Lord Diplock observed in *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1 514:
>
> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
>
> When it comes to the meaning of words, it does not matter whether they appear in a contract or written law.

We now examine clause 2.1(b) of the agreement. This clause reads as follows:

> the approval for the sale and purchase of the Land subject to and upon the terms and conditions herein contained being obtained by the Purchaser (which the Purchaser hereby undertakes to obtain) from its shareholders including the shareholders of Brisdale Holdings Berhad (hereinafter collectively referred to as "the Purchaser's Shareholders' Approval") as the case may be;.

We observe that the word "including" appearing in this clause is a term of extension. It imports addition. It adds to the subject matter already comprised in the definition, (see the cases of *S.M. James and Another v. Dr. Abdul Khair* AIR 1961 Patna 242 and *AC Patel v. Vishwanath* AIR 1954 Bombay 204). We have read this clause very carefully and it is our finding that the undertaking given by the respondent is in respect of obtaining the approvals of both its own shareholders and that of Brisdale Holdings Berhad, its holding company. The undertaking given by the respondent is plain and clear and there is no ambiguity. It is an undisputed fact that both parties in this case had legal representation in the drafting of the agreement and the respondent had given this express undertaking with the benefit of legal advice. The respondent cannot now resile from this undertaking so given to the appellant. In *The Central Bank of India Ltd., Amritsar v. Harford Fire Insurance Co. Ltd* AIR [1965] SC 1288 it was said:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

The respondent then submitted that it had done everything required in getting the approval from Brisdale Holdings Berhad and in the circumstances the refusal by the shareholders of Brisdale Holdings Berhad to approve the purchase transaction resulted in the condition precedent not being fulfilled and the agreement was consequently void.

We are not persuaded by this submission of the counsel. We have carefully examined the appeal record and we find that the respondent had in fact done the very opposite. The chairman of Brisdale Holdings Berhad had informed the shareholders at the EGM that the credit facilities of RM285 million to finance the balance purchase price and working capital for the land was suspended, that the slowdown in the property sector will no doubt have an adverse effect on the project as the profit margin may be squeezed due to high interest rate and holding costs and he further explained that the land purchase may be frustrated. This is stated in the extract of the minutes of the EGM of Brisdale Holdings Berhad (appeal record p. 518):

EXTRACT OF THE MINUTES OF THE EXTRAORDINARY GENERAL MEETING HELD ON 23RD DECEMBER, 1997, 3.00P.M. AT KAYANGAN BALLROOM, HOLIDAY INN SHAH ALAM, PLAZA PERANGSANG, PERSIARAN PERBANDARAN, 40000 SHAH ALAM, SELANGOR DARUL EHSAN

ORDINARY RESOLUTION 2

PROPOSED ACQUISITION OF LAND IN MUKIM BATANG KALI, HULU SELANGOR FROM SILVER CONCEPT SDN BHD

Prior to the tabling of the abovementioned resolution for voting the Chairman informed the Meeting that the syndicated credit facilities of RM285.0 million which Ekspedisi Ria Sdn Bhd obtained on 4th November 1997 from Aseambankers Malaysia Berhad, Malayan Banking Berhad, Mayban Finance Berhad and PhileoAllied Bank (M) Berhad (the syndicated lenders) to finance the balance of the purchase price of the land as well as working capital for the development of the said land has been suspended *via* Aseambankers Malaysia Berhad's letter dated 12th December 1997 regardless of the full compliance of the condition precedents.

At this juncture, Encik Ali bin Ibrahim enquired as to whether it is viable for the Company to undertake the development of the project in view of the current dampening economic condition especially with the slowdown in the property sector.

The Chairman explained that the slowdown in property sector will no doubt has an adverse effect on the project as the profit margin may be squeezed due to high interest rate and holding cost.

On the enquiry made by Mr Yong Wooi Hon as to how the Company will finance the acquisition as the loan has already been suspended, the Chairman explained that the land purchase may be frustrated as a substantial portion of the purchase price is to be financed by loan. The Chairman then left it to the shareholders to decide.

Upon the proposal of Ms. Lim Peng Sim and seconded by Cik Marina Razali, the above resolution pertaining to the proposed acquisition of land was tabled for voting. The resolution was defeated or rejected by overwhelming majority.

Date this 23rd day of December 1997

CERTIFIED TRUE &
CORRECT
Sgd: Director
Sgd: Director/Secretary

We note from the above minutes that the syndicated credit facilities of RM285.0 million was suspended whereas the balance purchase price to be paid by the respondent was only to the extent of RM50,000,800. It is abundantly clear to us that when the chairman made the above announcement and explanation at the EGM the shareholders of Brisdale Holdings Berhad were clearly being advised and guided to reject the purchase of the land under the agreement. That is precisely why the shareholders rejected the resolution to approve the land transaction under the agreement. We therefore reject the respondent's submission that it had done everything required to be done in order to obtain the approval of the shareholders of Brisdale Holdings Berhad which it undertook to obtain. No step was taken by the respondent to advise the shareholders of the holding company of the likely consequence of the breach of the undertaking already given by it to the appellant in the agreement. The respondent in giving the undertaking to the appellant ought to have taken into account of the possibility of the dampening of the economic condition in the future and of the possibility of the slowdown in the property sector which would no doubt have an adverse effect on the project as the profit margin may be squeezed due to high interest rate and holding cost. This foresight as to the future happening which may result in the loan to finance the project may be curtailed, is not something which the law would consider as a frustrating event resulting in the lawful termination of the agreement with the appellant.

The case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 cited by the respondent's counsel is of no assistance to the respondent. In that case the FIC approval was not obtained. There was no promise or guarantee or undertaking given that such an approval will be obtained from the government. In any event, the giving of the approval by the FIC or otherwise is clearly beyond the control of the person seeking for such an approval. However in this appeal before us the FIC approval was already obtained on 10 July 1997. There was, in the present case before us, an express undertaking given by the respondent to obtain the approval of the shareholders of Brisdale Holdings Berhad.

In our judgment the respondent is bound by its undertaking given in the agreement to obtain the approval of the shareholders of Brisdale Holdings Berhad. The failure of the respondent to obtain the approval was a clear breach of the express undertaking given in clause 2.1(b) of the agreement and therefore the respondent was in breach of the agreement.

The Issue Of Frustration

We now deal with the issue of frustration as understood under the law of contract. The respondent's counsel submitted that the obtaining of a loan from financial institutions by the respondent to pay a substantial portion of the purchase price was clearly known and in the contemplation of the parties as noted from the terms of the agreement. When the credit facility of RM285 million was suspended by the bank the respondent was unable to pay the balance of the purchase price to complete the purchase of the agreement. He argued that this was a supervening event beyond the control of the respondent and as a result the agreement became frustrated and void pursuant to s. 57 of the Contracts Act read with ss. 15 and 16 of the Civil Law Act.

Before we deal with this issue we need to examine the reason that was given by the respondent to bring the agreement to an end. For this we turn to the respondent's solicitors letter dated 24 December 1997 (appeal record p. 518) which is in the following terms:

> Bil Kami: cmy.245.larut.416a.97
> Tarikh: 24th December 1997
>
> Messrs Rajah Lau & Associates
> Advocates & Solicitors
> Suit 488, 4th floor,
> Wisma Methodist
> No 1, Lorong Hang Jebat
> 50150 Kuala Lumpur
>
> Attn: Mr Eg Kaa Chee
>
> Dear Sirs,
>
> Re: Sale And Purchase Agreement Dated 31.3.97
> Vendor : Silver Concept Sdn Bhd
> Purchaser : Ekspedisi Ria Sdn Bhd
>
> We refer to the above Agreement.
>
> As one of the pre-conditions of the said Agreement is that the shareholders Brisdale Holdings Berhad should approve the purchase of the subject land in a general meeting, an Extraordinary General Meeting (EGM) was held on 23rd December 1997 to seek the approval of the shareholders of Brisdale Holdings Berhad for the purchase of the subject land. However, the shareholders unanimously refused to give their approval for the purchase of the said land.
>
> In the premises, we hereby inform you that since the aforesaid pre-condition has not been satisfied, the abovementioned Agreement is at an end.

> We, therefore, on our client's instructions request for the refund of all monies paid to you and/or your client pursuant to the terms of the said Agreement including any interest accrued and accruing.
>
> Yours faithfully,
>
> cc Ekspedisi Ria Sdn Bhd.

We find that there is no mention at all in this letter by the respondent's solicitors that the loan facility had been suspended and therefore the agreement is frustrated or at an end. From the terms and clear language of this letter it is very clear to us that the only reason given and relied upon by the respondent to bring the agreement to an end was that the third condition precedent was not fulfilled. There were no other reasons given in the letter. The respondent cannot now as an afterthought invent or advance another reason as to why they sought to bring the agreement to an end at the material time in question.

In any event the trial judge had dealt with this issue. The trial judge had admirably dealt with the issue of frustration by succinctly applying the relevant authorities including our own Federal Court cases and concluded that on the facts of this instant case the contract in question was not frustrated on account of the respondent's failure to obtain a loan to pay the balance of the purchase price. This is what the trial judge said in his judgment (appeal record pp. 21 to 23).

> On doctrine of frustration
>
> The modern concept of frustration was succinctly formulated by Lord Radcliffe in the case of *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 at p 729 in the following terms:
>
> > ... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.
>
> In *Kim Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 MLJ 256 at p 258, the Federal Court held that:
>
> > The doctrine does not apply just because the promisor's obligation has become, because of the change of circumstances more onerous than what he has contracted for ...

> ... In the present appeal there can be no doubt that it would be a heavy financial burden on the appellant to build the houses contracted for and to complete the contracts with its purchasers because costs have since spiralled. But this point is not a relevant factor for calling the doctrine of frustration into play. To invoke the doctrine the appellant must show that the completion of every one of these contracts is in substance a different obligation from what it had previously agreed to, ie, a new agreement altogether. In our view the substance remains for the same.

In *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 the Supreme Court held at p 262 that:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

Reverting to instant case, the foundation and subject matter of the contract was the sale and purchase of the said land. The character of the said land remained the same. There is no supervening event which significantly changed the nature of the said land. The said land has not become radically different from that which was undertaken by the contract (see *Davis Contractor*'s case, *supra*). The fact that the plaintiff was unable to obtain a loan to pay the balance of purchase price did not have the effect of frustrating the contract. This was clearly expounded in the Court of Appeal case of *Universal Corporation v. Five Ways Properties Ltd* [1979] 1 All ER 552 at p 554 where the Court of Appeal (Buckley LJ) in referring to the doctrine of frustration held that:

> The Judge dealt with the topic of frustration quite shortly. He said:
>
> > But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.
>
> That seems to me to be an accurate and proper statement. Certainly the plaintiff was unable, by reason of matters beyond its control, to complete the contract when it should have done so, but this is something quite different from the contract having become incapable of performance; nor in my view, can it be suggested that anything had happened to make the performance of the contract, in the circumstances existing at the date for completion, significantly different from what was contracted for: see *Davis Contractors Ltd v. Fareham Urban District Council* [1956] 2 All ER 145 at 160. On the material before the court, in my judgment, no frustration is shown to have occurred.

Applying the principle as enunciated in the aforesaid cases to the facts and circumstances of the instant case, I hold that the contract was not frustrated on account of the plaintiff's failure to secure the release of the loan for payment of the third instalment pursuant to SPA.

In our judgment the law of frustration of contracts has been well settled by our own Federal Court judgments. It does not involve any new or novel principles of law. It requires merely an application of the settled and established principles of law to the facts of a particular case. In this appeal we find that the learned trial judge had correctly addressed and guided himself to the settled authorities on the law of frustration and came to a correct finding. We find no error in his finding that the contract in this case was not frustrated and we concur with his decision.

The Claim For Specific Performance And Damages For Breach Of Contract In The Pleadings

Another ground advanced by the respondent is that the appellant cannot maintain an action for breach of contract when its principal claim for specific performance was not granted by the trial judge. The respondent's counsel submitted that such inconsistent causes of action cannot be maintained because the claim for specific performance is on the basis that the agreement is afoot whereas the claim for damages for breach of agreement or damages for breach of undertaking is on the basis that the agreement is not afoot. He relied on the cases of *Ardeshir v. Flora Sassoon* [1928] AIR 208 PC, *Hipgrave v. Case* [1885] 28 Ch. D 356, *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* [2002] 1 CLJ 261 to substantiate his argument on this point.

In response, the appellant's counsel submitted that this issue was not pleaded nor was it argued in the court below. He submitted that there is no inconsistency in the appellant maintaining a claim for specific performance of the contract and also seeking damages for breach of contract in lieu of specific performance and he cited several authorities to support his submission. He also distinguished the cases cited by the respondent and submitted that the respondent's submission on this issue is completely misconceived in law and suffers from a serious fallacy.

We find that this ground was not raised by the respondent in the court below and it was also not raised in the respondent's memorandum of cross appeal. As this is a question of law we will deal with it. We have carefully studied the cases cited by the respondent's counsel and we find that the principles expounded in those cases are not applicable to this appeal. In the case of *Ardeshire v. Flora Sassoon* the plaintiff had abandoned his claim for specific

performance 9 months before the trial. In *Hipgrave v. Case* the plaintiff had abandoned his claim for specific performance at the trial. In *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* the respondent decided to abandon the prayer for specific performance at the hearing in chambers. We find that in this appeal the appellant had all along maintained its claim for specific performance right up to the conclusion of the trial and had never abandoned it. The appellant was at all material times ready, able and willing to carry out and perform its entire obligations under the agreement. The question of abandonment is very important and was clearly emphasised by the court of appeal in the case of *Tan Meng San v. Lim Kim Swee* [1962] 28 MLJ 174 at 178 as follows:

> There is a wide distinction between the present case and the case of *Ardeshire H. Mama v. Flora Sassoon* which was cited by Mr. Hills. In that case the suit was in its inception an action for specific performance of a contract for the sale of land with claims for damages in addition or in the alternative. The claim for specific performance was later abandoned by the plaintiff who at the trial claimed damages for breach of contract. In the Judicial Committee their Lordships (per Lord Blanesburgh) discussed at some length the history of the equitable relief of specific performance, and considered the effect of section 19 of the Indian Specific Relief Act (section 18 of our Ordinance) in the light of decisions on section 2 of Lord Cairns' Act. The conclusion at which their Lordships arrived was that where a claim for specific performance of a contract is joined with a claim for damages for breach of the contract and the claim for specific performance is abandoned, there is no power in the Court to award damages without an "apt and sufficient amendment of the plaint". The position in the present case is, however, quite different, for here the respondent has never expressly abandoned his claim for specific performance and his election to sue on a severable part of the contract, as he did in Civil Suit No. 51 of 1959, does not in the circumstances amount to an implied abandonment of that claim.

In the trial below the appellant had throughout maintained the claim for specific performance. It was reinforced in their written submission before the court (appeal record pp. 298 to 307). At the end of the trial it was the court that decided not to grant the appellant an order of specific performance of the agreement. A party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract is a perfectly usual claim. The Privy Council had held in the case of *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ 457; [1982] CLJ (Rep) 58:

> The action was on its face a normal one for specific performance requiring the vendor (present appellant) to transfer the land to the purchaser in fact Loh Koon Moy, Lam Wai Kee having acted on her behalf. The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract – a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff ...

> The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion.

We therefore hold that there is no inconsistency in the appellant maintaining a claim for specific performance and also seeking damages for breach of the contract in lieu of specific performance. This is fortified by the case of *Souster v. Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at p. 521 in the following passage:

> Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead). The logic in the judgment of Scholl J would be hard to refute, for if the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the Court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the Court, the contract remains on foot.

We agree with the appellant's submission that particularly in the area of contracts for the sale of land a party in a suit must put forward all its claims in one and the same cause of action. We adopt the following passage in the case of *Neylon v. Dickens* [1987] 1 NZLR 402 at 409 and 410:

> In the particular field of contracts for the sale of land this Court held as long ago as 1902 in *Dillon v. Macdonald* 21 NZLR 375, 393, that every remedy that can be claimed in respect of the same cause of action must, under New Zealand procedure, be claimed in the one action. And that as the plaintiff there could have made in the former action (an action for specific performance dismissed for unreasonable delay) her alternative claim (a claim to common law damages for breach of the same contract) she could not by dint of having limited her prayer for relief in the first action take a second proceeding claiming another remedy on the same cause of action.
>
> Whether the present is strictly a case of merger arising from *res judicata* (as Hardie Boys J thought), or estoppel *per rem judicatam*, or simple abuse of procedure, it is unnecessary to debate. In our opinion it is plain that the delay-in-settlement claims for damages arise on the same cause of action as led to the decree for specific performance. The purchasers should have put forward all their claims on that cause of action timeously, under the supplementary jurisdiction if need be, in the first action. They failed to do so and must accept the consequences.

The Award Of Agreed Liquidated Damages Under Clause 10.1 Of The Agreement

The trial judge had in his judgment held that the respondent was in breach of contract as envisaged under clause 10.1 of the agreement and proceeded to award damages under clause 10.1 of the agreement. He first ordered the forfeiture of the 10% deposit in favour of the appellant. He then ordered further damages of RM415,147.35 in favour of the appellant and his reasoning in arriving at this amount was as follows:

> Under the second head of claim (further damages), it is observed that the expressions "due date" and "the date of forfeiture" as stated in Clause 10.1 of SPA are not defined. On proper construction of Clause 10.1, I hold that the "due date" to be the date of the defendant issuing the notice (Exh "B" p 135) for the plaintiff to pay RM45,280.800 (third instalment) and the "date of forfeiture" as the date of expiry of the notice. I said so because upon expiry of the aforesaid notice, on the facts, D1 was entitled to rescind the contract. It follows, therefore, that under this head, D1 is entitled to 11% of RM45,280,800 for 30 days which works out to be RM415,147.35; (appeal record page 26).

The respondent submitted that damages for breach of undertaking or damages for breach of contract cannot be awarded under clause 10.1 of the agreement. On the other hand the appellant submitted that clause 10.1 was very widely drafted and covers any kind of breaches committed by the respondent in respect of any of the provisions of the agreement. We now reproduce clause 10.1 of the agreement which is in the following terms:

> Default By The Purchaser
>
> 10.1 In the event of any breach by the Purchaser of any of the provisions of this Agreement the Vendor shall (subject to and after the expiry of a notice in writing to the Purchaser requiring the Purchaser to remedy such breach(es) within thirty (30) days from the date thereof provided always that such notice is only necessary if the breach(es) does/do not involve the payment of the 2nd Instalment or the 3rd Instalment) be entitled to forfeit the Deposit and the sum equivalent to eleven per centum (11%) per annum on the 3rd Instalment or portion thereof remaining unpaid/outstanding calculated from the due date until the date of such forfeiture by way of agreed liquidated damages and the Vendor's solicitors shall refund to the Purchaser all other monies paid by the Purchaser towards the purchase of the Land (free of interest) in exchange for the Titles whereupon this Agreement shall terminate and cease to be of any further effect but without prejudice to any right which either party may be entitled to against the other party in respect of any antecedent breach of this Agreement.

It is clear to us that clause 10.1 covers any breach by the respondent of any of the provisions of the agreement. In the case of *Aerlinte Eireann Teoranto v. Cananda (Minister of Transport)* [1990] 68 DLR (4th) 220 at 225 the Canadian Federal Court of Appeal held that the word "any" should be interpreted to mean all, each and every or whichever. Where the respondent had committed any breach of the agreement and if the breach is not remedied, the appellant is entitled to invoke clause 10.1 of the agreement and shall be entitled to forfeit the 10% deposit and claim a further sum equivalent to 11% per annum on the 3rd instalment or portion thereof remaining unpaid calculated from the due date until the date of such forfeiture by way of agreed liquidated damages.

The judge held that the "due date" was the date the appellant issued the notice to the respondent to pay the balance purchase price. This notice was dated 29 December 1997 (appeal record p. 496). Under clause 4.1 and 4.2 the completion date was 30 September 1997. There is an automatic extension of a further three months under clause 4.2 of the agreement whereupon the respondent is liable to pay the appellant interest at the rate of 11% per annum on the 3rd Instalment or portion thereof remaining unpaid. Therefore in accordance to the terms of the agreement the "due date" is 30 September 1997 and not 29 December 1997.

We find that the appellant had never forfeited the deposit and the sum equivalent to 11% per annum on the 3rd instalment remaining unpaid. In fact the difference between the balance purchased price and the loan sum amounting to RM17,921,200 was paid into court by the appellant's solicitors who were stakeholders pursuant to a consent order in the High Court dated 30 April 1998 (Tab 10 of Respondent's Core Bundle of Documents). The appellant did not serve any notice of forfeiture on the respondent. The appellant had at all material times sought specific performance of the agreement and was therefore insisting on the due performance and completion of the agreement and had maintained this position until the trial judge delivered his judgment on 22 July 2000.

In the circumstances the appellant could not have forfeited any monies while it was pursuing the remedy of specific performance of the agreement. The trial judge had only ordered the forfeiture of the deposit on 22 July 2000 and therefore the appellant was only legally entitled to forfeit the deposit on 22 July 2000. Therefore the phrase "until the date of such forfeiture" in clause 10.1 can only be on 22 July 2000, that is when the trial judge refused to grant specific performance and ordered the forfeiture of the 10% deposit. We therefore hold that "the due date" is on 30 September 1997 and "until the date of such forfeiture" is 22 July 2000.

For the reasons stated above the basis upon which the trial judge determined the "due date" and "the date of forfeiture" and consequently the amount of damages of RM415,147.35 cannot be supported in law. We therefore hold with respect that the trial judge had acted on a wrong principle or has made an entirely erroneous estimate of the damages.

It is trite law that an appellate court would be justified in interfering by reassessment of the damages where the judge below had acted on a wrong principle or has made an entirely erroneous estimate of the damages. In the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p. 799 Tan Sri Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court held as follows:

> We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate court would be justified in interfering by assessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v. Lovell* [1935] 1 KB 354 at p 360. He said:
>
> > ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
>
> In other words the two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.

We now consider whether the amount of damages under clause 10.1 of the agreement is a penalty. We did not hear serious arguments from the respondent's counsel on this point. It is now established that a party who attacks a liquidated damages clause as a penalty is in fact asking the court to relieve him from his contractual obligations which he had freely undertaken in exchange for good consideration. The courts would therefore generally preserve the sanctity of the contract freely entered into by the parties. (See the case of *Beihai Zingong Property Development Co & Anor v. Ng Choon Meng* [1999] 3 SLR 283 at 286 and 287).

In *Esley v. JG Collins Insurance Agencies Ltd* [1978] 83 DLR (3d) 1 at p 15 the Supreme Court of Canada held that:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

The High Court of Australia had held in *Esanda Finance Corporation Ltd v. Plessnig & Anor* [1989] 84 ALR 99 that an agreed sum is a penalty if it is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered.

In the case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 the appellant forfeited 10% of the purchase price and was awarded interest at 13% per annum on the balance purchase price and was also awarded interest at 19% per annum on the outstanding instalments. The court of appeal overruled the trial judge's finding that the extra 13% interest imposed by the appellant was caught by s. 75 of the Contracts Act 1950. Her Ladyship Dato' Siti Norma Yaakob JCA (now YAA Chief Judge of Malaya) held as follows:

> As for items (ii) and (iii) the principal objection raised is on the rates of interest chargeable as being excessive and a penalty under s. 75 of the Contracts Act 1950.
>
> As no part of the balance of the purchase price had been paid at all by the respondent, I cannot see how it can object to the imposition of 13% interest as that was the rate of interest agreed upon default under para (b) of the second schedule. Likewise the imposition of 19% interest on the arrears of instalments as that rate of interest is allowed by s. 5.16 of the agreement. Perhaps the only issue is whether the increased interest at 19% pa is caught by s. 75 of the Contracts Act 1950.
>
> To bring that increased or penalty interest within the ambit of s. 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% pa on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest cannot be caught by s. 75.

> I am aware that the 'Explanation' to s. 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the 'Explanation' is not mandatory in nature as the Legislature preferred the word 'may' as opposed to 'shall'. Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the 'Explanation' in s. 75.

In this appeal the respondent has failed to demonstrate to us that the agreed liquidated damages in clause 10.1 of the agreement is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered and is therefore a penalty clause. We had earlier pointed out that this agreement was drafted by the parties with the benefit of legal advice and the appellant and the respondent had both freely bargained and agreed upon to the formula of damages stipulated in clause 10.1 of the agreement as agreed liquidated damages. We therefore hold the agreed liquidated damages provision in clause 10.1 of the agreement is not a penalty clause. We would preserve the sanctity of the contract freely entered into by the parties. Interest calculated at 11% per annum on the 3rd Instalment sum of RM45,280,800 from 30 September 1997 till 22 July 2000 is RM14,001,071.

The Orders

In the result we dismiss the respondent's cross-appeal with costs. We affirm the order of the High Court in entering judgment in favour of the appellant and ordering the forfeiture of the 10% deposit of RM7,546,800 in favour of the appellant. We allow the appellant's partial appeal with costs in respect of the award of damages and we substitute the figure of RM415,147.35 with the amount of RM14,001,071. We also order interest on this amount of RM14,001,071 at the rate of 8% per annum to be calculated from 23 July 2000 till the date of full realization.

The court of appeal had on 15 May 2002 in Civil Appeal No. W-02-628-2002 made an order that a sum of RM15 million out of the monies released from the High Court is to be placed into a fixed deposit interest bearing account in the joint names of the appellant's solicitors Messrs VK Lingam & Co and the respondent's solicitors Logan Sabapathy & Co until the final disposal of this appeal by this court. We now order that the amount of RM15 million deposited into a fixed deposit interest bearing account in the joint names of the solicitors for both the appellant and the respondent together with all accrued interests thereon be released forthwith to the appellant solicitors for payment to the appellant. This is towards payment and satisfaction of the amount of damages awarded by this court together with interest thereon.

We are indebted to both counsel for the appellant and the respondent for their well researched submissions and presentation which has made our judicial task of writing this judgment much easier.

My learned brother Dato' Azmel bin Haji Maamor has read the draft judgment and concurs with it.

Tengku Baharudin Shah JCA:

Introduction

We heard both the above appeals together as they earlier seem to revolve around the same issues of law relating to frustration of contract and the same vendor Silver Concept Sdn. Bhd. being the common party. In the first appeal Civil Appeal No. W-02-555-2000 Brisdale Rasa Development Sdn. Bhd. (the first appeal) is named as respondent whereas in the second appeal Civil Appeal No. W-02-178-2001 Maxisegar Sdn. Bhd. (the second appeal) is the appellant. Having heard arguments of counsel for the respective parties over several days we reserved our judgment.

My learned brother Abdul Kadir Sulaiman JCA who chaired the panel of this court had graciously given me his judgment in draft a few days before we sat to deliver our decision on 5 May 2005. Upon studying the said draft I had my misgivings on the reasoning and outcome of the first appeal and was inclined to allow the respondent's cross-appeal. I indicated to my learned brother that I would be dissenting and would prepare my dissenting judgment in due course. As regards the second appeal, I expressed my concurrence with the finding and conclusion arrived at as well as the reasons therefor.

Unfortunately I was not ready with my judgment when we sat to deliver our majority decision on the first appeal and unanimous decision on the second appeal. Now I am. This is my decision on both appeals.

Civil Appeal No. W-02-555-2000 – The First Appeal

This is a partial appeal by Silver Concept Sdn Bhd (the appellant) against Brisdale Rasa Development Sdn. Bhd. (the respondent) on the low quantum of damages for breach of contract awarded by the learned trial judge. The respondent is also cross-appealing to reverse the entire finding of the learned judge dismissing its claim for a declaration that the said contract was terminated for non-fulfilment of the condition precedent or for frustration. The High Court judgment as reported in [2001] 1 AMR 1087 was arrived at after a full trial.

At the hearing of the appeal, we directed the learned counsel for the respondent to address us first on the cross-appeal in view of the fact that the opposing claims between the parties arose from the same transaction and such determination would settle the issue of liability between them. We only heard the appellant's quantum appeal after the response of its counsel on the liability question.

Background

The dispute is over the sale of three pieces of land in Batang Kali, Selangor with a total area of 397.2 acres (the said land) with the appellant as the vendor and the respondent as the purchaser. By an agreement dated 31 March 1997 (the agreement) the appellant agreed to sell and the respondent to purchase the said land for the price of RM75,468,000 upon the terms and conditions contained therein. The conversion of the category of use of the said land had been approved for the development of a comprehensive township with the premium therefor contemplated to be paid from a portion of the purchase money. The transaction was not however completed by the respondent for reasons the cross appeal is concerned with.

Uncontroverted Facts

The respondent, a property developer, is at all material times a wholly owned subsidiary of Pembangunan Brisdale Sdn. Bhd. which in turn is a subsidiary of a public company Brisdale Holdings Bhd. The appellant is the registered proprietor of the said land is also a subsidiary of a public company Promto Bhd.

It was envisaged in the agreement that the respondent would require a loan from financial institutions to enable it to complete the said purchase (see Recital 7 and clauses 3.1, 4.3, 4.6 and 6.2 of the agreement). A syndicated loan of RM90,000,000 was arranged by the financiers Aseambankers Malaysia Bhd. for the purpose, and a loan facility agreement was executed by the respondent within the stipulated time on 4 November 1997. It provides for RM50,000,000 as a term loan for the said purchase and RM40,000,000 as bridging finance and revolving credit for the respondent.

The respondent had paid a 10% deposit amounting to RM7,546,800 towards the purchase price upon execution of the agreement. A further RM17,921,200 was also paid on 30 June 1997 as part of the second instalment to the 2nd defendant as stakeholders pursuant to clauses 4.6 and 7.1 of the agreement, being the difference between the purchase price and the expected loan amount.

However, by its letter dated 12 December 1997, Aseambankers Malaysia Bhd gave the respondent notice of suspension of the drawdown of the syndicated loan regardless of the full compliance of the conditions precedent. The first two paragraphs of the said letter read as follows:

> As you are aware, the heightening turbulance in the currency and equity markets in the region as well as globally has given everyone a growing cause for concern. In view of the current economic situation surrounding us, we anticipate that this uncertainty may be prolonged. In the local scene, the various monetary measures announced by the Government which include amongst others the curb on lending growth coupled with the lending restrictions to the property sector would have significant negative impact on all property development projects.
>
> Given the above and pursuant to clause xvii under section 15 of the Facility Agreement dated 4.11.97, as Agent for the Syndication, we wish to advise that some of the lenders have decided to suspend any drawdown under the aforesaid syndication pending further reassessment of the project. Please note that the suspension of drawdown shall be effective regardless of the full compliance of the conditions precedent.

And the respondent informed the appellant of the same by its letter of 18 December 1997.

Significantly, the agreement was expressly made conditional upon and subject to three conditions precedent set out in clauses 2(a), (b) and (c) being fulfiled within "The Approval Period" (30 September 1997) or "the Additional Period" (31 December 1997) as the case may be. The first pre-condition was the approval of the Foreign Investment Committee (FIC) which was duly obtained within the prescribed time. The third, which had also been fulfiled, was the approval of the shareholders of Promto Properties Sdn. Bhd. and Promto Bhd., the immediate and ultimate holding companies of the appellant. It was the second condition that gave rise to this dispute and that is the approval of the shareholders of the respondent including the shareholders of Brisdale Holdings Bhd. its holding company which the respondent appears to have undertaken to obtain. The shareholders of Brisdale Holdings Bhd. at its Extraordinary General Meeting (EGM) held for the purpose on 23 December 1997, however, upon being appraised of the economic downturn in the region and the consequent government restrictions on lending by financial institutions which caused the suspension of the approved loan, rejected the proposed acquisition of the said land by an overwhelming majority.

Consequent to the outcome of the EGM of Brisdale Holdings Bhd., the respondent by its solicitors' letter dated 24 December 1994 gave notice to the appellant's solicitors that since the precondition of the agreement had not been met, the agreement was at an end. And a request was made for the refund of all monies paid thereunder with interest.

In response thereto, the appellant's solicitors reminded the respondent of its undertaking under clause 2.1(b) of the agreement and by letter dated 29 December 1997 rejected the said termination alleging that the respondent had breached the agreement by failing to obtain its shareholders' approval. Notice was given to remedy the breach within 30 days thereof.

In any event, after further correspondence between solicitors, the respondent filed its claim dated 6 January 1998. The appellant's counterclaim followed seven months later.

The Opposing Claims

It is the contention of the respondent who was the plaintiff in the court below that the agreement had come to an end. In its statement of claim the respondent essentially sought for a declaration that the agreement was terminated *ipso facto*:

a. for non-fulfilment of the condition precedent;

b. alternatively for frustration.

And claimed for refund of the RM25,568,000 it had paid thereunder with interest and costs.

In its counterclaim the appellant sought for the following orders:

(1) a declaration that the agreement is not frustrated and is still valid, legal and binding and enforceable in accordance to its terms;

(2) for specific performance of the agreement;

(3) damages in addition to and/or damages for breach of contract in lieu of specific performance;

(4) damages for breach of undertaking given by the respondent to obtain the approval of the shareholders of the defendant and the shareholders of Brisdale Holdings for the purchase transaction in the agreement;

(5) interest at the rate of 11% per annum on such damages from the date of the award to the date of full realization;

(6) Order that the said damages and interest awarded be set-off against the deposit and other monies received inclusive of for the interest which is to be paid into court on an interest hearing account; and

(7) costs of this action on a solicitor – client basis.

Findings Of The Trial Judge

It is significant that the learned trial judge in his judgment saw only one issue for determination before him. And that is, whether the respondent was in breach of contract. Applying the principles enunciated in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 at 729, *Kim Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 MLJ 256, 258, *Ramli bin Zakaria & Ors v. Government Of Malaysia* [1982] 2 MLJ 257, 262 and *Universal Corporation v. Five Ways Properties Ltd* [1979] 1 All ER 552 at 554 he held that "the contract was not frustrated on account of the plaintiff's failure to secure the release of the loan for payment of the third instalment pursuant to the sale and purchase agreement."

The learned judge then considered the effect of breach of undertaking and found as follows:

> The upshot of the refusal by the shareholders of Brisdale Holdings Bhd to approve the acquisition of the said Land by the plaintiff, D1 (1st Defendant) caused a notice (Exh "B" p. 135) dated December 29, 1997 to be issued for the plaintiff to remedy the breach within 30 days from the date of the letter. As the plaintiff failed to pay the third instalment of RM45,280,800, I hold that the plaintiff was in breach of contract as envisaged under Clause 10.1 of the aforesaid Sale and Purchase Agreement.

He then proceeded to hold that the appellant was entitled to the agreed liquidated damages under clause 10.1 of the agreement.

The respondent's claim was thus dismissed and judgment was entered for the appellant on its counterclaim as follows:

(i) no order on prayer (i) and (ii);

(ii) deposit of RM7,546,800 to be forfeited to D1;

(iii) RM415,147.35 with interest at 8% p.a. from the date of judgment to date of realization;

(iv) costs to D1.

From his judgment the learned trial judge clearly made his finding on frustration but the issue of the non-fulfilment of the condition precedent was not considered at all despite the same being the substance of the respondent's claim in the court below as reflected in the first declaration sought for in its statement of claim. The judgment is also not clear whether the respondent was held to be accountable for breach of contract or for breach of the undertaking to obtain the shareholders approval. From the above quoted passage of the judgment, the fact that the respondent was given 30 days to remedy the breach

must necessarily refer to its undertaking under clause 2.1(b), but the learned judge held the respondent to be in breach of contract for failing to pay the third instalment of RM45,280,000. Thus, whether the damage awarded was for breach of contract in lieu of specific performance asked for in prayer 30(3) or for breach of undertaking claimed in prayer 30(4) of the appellant's counterclaim is a point for speculation.

Condition Precedent

The first complaint of the respondent in this appeal is that the learned trial judge in his judgment clearly failed to consider the failure of the condition precedent to the agreement when he held that the agreement is subsisting despite the inability and illegality of complying with the terms thereof. That to me is a valid point raised, as the learned judge, when he said that the issue before him was whether the respondent was in breach of contract, seems to have assumed that the said contract was subsisting without considering the effect of the undisputed non-fulfilment of one of the conditions precedent.

Learned counsel for the appellant contends that it was common ground between the parties in the court below that there was a binding contract. He referred to us the submissions of counsel at the opening of the trial on 24 April 2000 as follows:

> **Encik Joginder**
>
> Common ground, there was a binding contract.
>
> ...
>
> It is common ground that there was binding contract. The question is who is in breach of contract?
>
> 2 Issues:
>
> i. whether non-fulfilment of condition precedent by Plaintiff terminated the contract.
>
> ii. was S & P frustrated having regard to circumstances of this case.
>
> **Dato' Lingam**
>
> Agree, there was a binding contract.

The stand of the respective parties was clear in that the agreement on its execution was binding on them, but whether it was still subsisting depends on the legal effect of the non-fulfilment of the condition precedent and on whether the sale and purchase was frustrated by supervening events. These same two issues were put before the court for determination. The concession was logical and necessary as there must exist a binding contract before the issues of its termination or frustration can arise. If this concession to the

existence of a binding contract had misled the court into ignoring the vital issue of non-fulfilment of the condition precedent, then it is a clear and fatal misdirection on the part of the learned judge. It is an error which has to and must be corrected in this appeal.

It is apparent from his judgment that the learned trial judge failed to consider and determine the main issue he was faced with, though he seems to appreciate that "the condition precendent in clause 2.1(b) is also the requirement of the Kuala Lumpur Stock Exchange Main Board Requirement which is subject to ss. 2, 11, 100, 122 and 123 of the Securities Industries Act 1983." Indeed, as submitted by learned counsel for the respondent, it is also a requirement of the Companies Act 1965 s. 132C, the non-fulfilment of which would not only render the proposed acquisition of the said land by the respondent void and unenforceable but also expose its directors to legal sanction.

In *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 the sale and purchase agreement was conditional on the vendor obtaining a renewal of the lease of the subject land. It was provided that if for any reason whatsoever the vendor was unable to fulfil this condition the agreement should become null and void and the vendor refund the monies paid. It was also provided that the completion of purchase was to take effect on or before a specified date. The purchaser duly paid the deposits required but the vendor had not by the stipulated date obtained the renewal. The Privy Council held that the purchaser was entitled to the return of his monies on the principle that where a conditional contract of sale fixes the date by which the condition is to be fulfiled then the date so fixed must be strictly adhered to. The basis for this is that until the condition is fulfiled there is no contract of sale to be completed.

In a somewhat similar condition the English Court of Appeal in *Property & Bloodstock v. Emerton* [1968] 1 Ch 94 is said to have expressed grave doubts as to the correctness of the Privy Council's characterisation of the condition in *Aberfoyle's (supra)* as a condition precedent to the termination of the contract. In that case a sale and purchase agreement between the vendor and the purchaser was made subject to the vendor obtaining the consent of the landlord to the assignment of the lease which was the subject matter of the sale to the purchaser. The majority of that court held that such stipulation was not a contingent condition but a mere term of the contract relating to title. Lord Danckwerts LJ expressed his view in that case as follows:

> Of course, if the necessary consent by the landlords to the assignment cannot be obtained, it defeats the sale, but this is a supervening event.

Our Federal Court in a like situation in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 however invoked ss. 33(a) and (b) of the Contracts Act 1950 and drew support from *Aberfoyle's (supra)* interpretation of such a condition as a contigent condition in preference over the *Property & Bloodstock's (supra)* categorisation of it as a promissory condition. It was a condition of the agreement in that case that the sale of the land was subject to the approval of the FIC and that the purchase be completed within specified periods. It was held that the agreement became void when the FIC refused to approve the sale over which neither party had control. In delivering the judgment of the court Salleh Abas CJ (Malaya) (as he then was) said:

> Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contigent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled.

After referring to certain authorities he continued:

> Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by section 33(a) of the Contracts Act which enacts:
>
> > 33(a). Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:
>
> > 33(b). If the event becomes impossible, such contracts become void.

The court, however also held that whether the requirement as to approval is a contingent condition (as in *Aberfoyle*) or is a mere promissory condition (as in Property & Bloodstock) the result would not be different as in the first case there was no agreement to enforce until the requirement was satisfied whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement.

While the court is generally slow in striking down a contract and will normally endeavour to uphold the bargain arrived at between the parties thereto, in construing their wishes it has always respected and deferred to their real intention as expressed by the words used in the term and conditions stipulated therein. Particularly so where, as in this case, such terms and conditions are incorporated with the benefit of legal advice. In *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd.* [1995] 2 CLJ 23, 31 the Federal Court following *Schuler (L) Ag v. Wickman Machine Tools Sales Ltd.* [1974] AC 235 held that for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used – the presumption being that the parties intended to say that which they have said.

It is therefore pertinent to look first at the relevant clause of the agreement on the issue. That would be clause 2 which is as follows:

2. **Conditions Precedent**

2.1 This Agreement for the sale and purchase of the land is conditional upon and subject to:

(a) the approval of the Foreign Investment Committee (hereinafter called 'the FIC') being obtained within six (6) months from the date of this Agreement (hereinafter referred to as 'the Approval Period') PROVIDED ALWAYS that should the Purchaser be unable to obtain the approval of the FIC within the Approval Period, the Vendor hereby agrees to an automatic extention of a further three (3) months commencing from the date of the expiration of the Approval Period (hereinafter referred to as the 'Additional Period') ...;

(b) the approval for the sale and purchase of the Land subject to and upon the terms and conditions herein contained be obtained by the Purchaser (which the Purchaser hereby undertakes to obtain) from its shareholders (including) the shareholders of Brisdale Holdings Berhad (hereinafter collectively referred to as 'the Purchaser's Shareholders' Approval') within the Approval Period or the Additional Period as the case may be; and

(c) The Two Promtos' Shareholders' Approvals (hereinafter defined) being obtained by the Vendor within the Approval Period or the Additional Period as the case may be.

(See AR pp. 407-408)

The term 'Conditions Precedent' as the title for clause 2 and the words "conditional upon and subject to" used in the following body of that clause speak for themselves. They state the true intention of the parties that the sale and purchase of the said land was contingent upon the approvals stipulated in sub clauses (a), (b) & (c) that follow being obtained first. In other words, there is no enforceable contract unless and until the three conditions are fulfiled. This view is fortified by the stipulation in clause 1.1 to the effect that the deposit paid thereunder is only deemed to be part payment towards the purchase price upon the sale/purchase becoming unconditional. The second part of clause 1.1 reads:

> In the event this Agreement and the sale and purchase of the Land should become unconditional, the Deposit shall be deemed to be part-payment towards the Purchase Price.

Further support can also be found in clause 4.1(b) of the agreement which provides for the third instalment of 60% of the purchase price to be paid six months after the date of the agreement or one month after the fulfilment of the Conditions Precedent referred in clause 2.1 whichever is the later. The necessary implication of that provision is that the date for completion of the transaction is suspended and cannot be enforced until all the conditions precedent have been fulfilled.

As indicated earlier in this judgment the first and third preconditions have been duly satisfied in good time. With the rejection of the proposed acquisition by Brisdale Holdings Bhd., the respondent's holding company and shareholders, a few days before the dateline the second condition under clause 2.1(b) became impossible to fulfil thus rendering the transaction void according to s. 33(b) of the Contracts Act.

It is also observed that time is of the essence under clause 23 of the agreement as such the sale/purchase of the said land became void on the approval under clause 2.1(b) not being obtainable even before the expiry of the Additional Period (see s. 36(1) of the Contracts Act).

The conditions precedent in clause 2.1(a), (b) and (c) of the agreement no doubt express the clear intention of the parties to bind themselves to the obligation thereunder only if and when all the stipulated approvals are obtained. This is necessarily so in view of the fact that the specified conditions incorporate legal and statutory requirements that must be satisfied before such sale/purchase of property by companies can constitute a valid and enforceable transaction. The learned judge recognized that the condition in clause 2.1(b) is a requirement of the Securities Industries Act 1983 and as submitted by learned counsel it is also in compliance with the Companies Act. The same

applies to clause 2.1(c). Similarly clause 2.1(a) is another legal requirement. Both parties had the benefit of expert legal advice in drawing up the agreement and knew very well that the non-fulfilment of these conditions would not only render the sale/purchase transaction void but also expose their directors to legal sanction. Inevitably, neither party in the circumstances intended to be bound to perform its obligations under the agreement unless and until these conditions are fulfilled. As the condition precedent in clause 2.1(b) was not fulfilled the transaction *ipso facto* came to an end. Notwithstanding whose fault it was, neither party can hold the other to its bargain as the transaction has been rendered void by the incapacity of the respondent and/or the consequent illegality or invalidity. The court will not in any event enforce any contract violative of the law. (See *Chung Khiaw Bank v. Hotel Rasa Sayang Sdn. Bhd.* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, *Affin Credit (Malaysia) Sdn. Bhd. v. Yao Yuen Fui* [1984] 1 MLJ 69 and *Ibrahim Bin Ismail & Anor v. Hasnah bt. Puteh Imat* [2004] 1 CLJ 797).

It is submitted before us as was done in the court below that the undertaking given by the respondent in clause 2.1(b) was a condition precedent of the agreement. And the respondent is alleged to have committed a breach of that undertaking by its failure to obtain the approval of the shareholders of Brisdale Holdings Bhd. and consequently was in breach of the agreement. It is perhaps for the same reason that the learned judge was led into error. The argument is substantially flawed, missing the wood for the trees. As shown earlier and looking at the relevant clause of the agreement the intentions of the parties as expressed by the words they used are clear as to what the conditions precedent were. Notwithstanding any undertaking being given, if any precondition is not fulfiled the agreement would still be unenforceable. In the same vein a breach of undertaking to fulfil any such condition would not revive or restore the void agreement as, unlike in mathematics, in law two negatives would not make a positive. In any event, it is preposterous to construe the words "which the purchaser hereby undertakes to obtain" within a bracket inconspicuously hidden in clause 2.1(b) to govern and supercede the very substance of the condition itself which is that of obtaining the approval of the shareholders of the respondent.

In all the above circumstances, the respondent definitely had a good case in law and fact. I would allow the cross-appeal, set aside the orders of the High Court and grant the declaration sought for by the respondent in prayer (a) and also order a refund of all monies paid with interest and costs. Consequently frustration is no longer an issue as such the appellant's claim (1), (2) and (3) must accordingly fail.

There remains however the appellant's claim for damages for breach of undertaking by the respondent to obtain the approval of its shareholders including Brisdale Holdings Bhd. under clause 2.1(b) of the agreement. In view of the fact that both parties are subsidiaries of a public company, the substantial value of the asset or property transacted, the applicable laws and the benefit of legal advice it would be absurd to construe the undertaking given to exclude the approval of the shareholders of Brisdale Holdings Bhd. which is the holding company of the respondent. It goes without saying that Brisdale Holdings Bhd. shareholders are also shareholders of the respondent, as such the word "(including)" in that clause is really superfluous. This is apart from the fact that it is a statutory requirement that the shareholders of a company must approve such substantial disposal or acquisition of property (see s. 132C of the Companies Act). To that extent the submission of learned counsel for the respondent must be and is rejected.

However the extent of the undertaking must be construed in the context of clause 2.1(b) itself. To construe it as a guarantee would be far fetched as that would be an impossibility which the parties must be aware of. No subsidiary company has the capacity to give such guarantee. More so in this case where the parent company is a public company whose shareholders are free to vote as they please. Nor can it be equated with the undertaking given by solicitors or litigating parties in court when seeking for injunctions or like orders where the obligation is to pay or indemnify the other party in the event the order is subsequently found to be wrong or unjustified.

The *Concise Oxford Dictionary* 9th edn defines the word 'undertake' to mean "1. bind oneself to perform, make oneself responsible for, engage in, enter upon (work, an enterprise, a responsibility). 2. accept an obligation, promise. 3. guarantee, affirm (I will undertake that he has not heard a word)." Applying the literal meaning of the word 'undertake' in the context of clause 2.1(b) the respondent is merely making itself responsible for, accepting an obligation or affirming that it would take the necessary actions to get the approval and nothing more.

The fact that a syndicated loan had been obtained, and the EGM was called by Brisdale Holdings Bhd. with recommendation to approve the acquisition and a decision was made (though unfavourable) before the dateline stipulated sufficiently prove that the undertaking has been fulfiled by the respondent. The respondent had no control or even any say over the votes of the shareholders of its holding public company (see *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd.* [1996] 1 MLJ 661). And the directors are obliged not to give bad advice and are duty bound to disclose facts and express honest opinions in the interest of the company (see *John Crocother Group v. Carpet International* [1990] BCLC 460).

Learned counsel for the appellant contends that it was on the basis of this undertaking that the parties entered into the agreement. The respondent is said to have voluntarily and freely imposed upon itself this additional obligation by giving the undertaking and did so with benefit of legal advice as the agreement was drafted by their lawyers. It is also alleged that from the facts the appellant had not given any undertaking to obtain the approval of its parent company Promto Bhd. It is not true that the undertaking was the basis for the parties to enter into the agreement. If it were so, the relevant clause would not be hidden so inconspicuously, within brackets in one of the provisions pertaining to conditions precedent when it should be in one of the 7 preambles or the 28 clauses of the 44 page agreement. While it is true that the word undertaking is use in respect of the respondent in clause 2.1(b) it is incorrect to say that the appellant did not also give such undertaking. Clause 3.1(p) under the heading 'Vendor's Representations and Warranties' provides for a similar obligation on the part of the appellant as a term of the contract except that the words 'shall procure' are used instead which effectively impose the same burden on the appellant. Clause 3.1(p) reads as follows:

> (p) the Vendor shall simultaneously with the execution of this Agreement deliver certified true copies of the Vendor's board resolution and shareholders' resolution and shall procure the approval of the Board of Directors and shareholders of Promto Berhad and Promto Properties Sdn. Bhd., authorizing and/or approving the Sale and Purchase of the Land to the Purchaser at the Purchase Price and upon the terms and conditions herein contained (hereinafter referred to are the "the Two Promtos' Shareholders' Approvals") within the Additional Period.

To construe the undertaking in clause 2.1(b) as a guarantee as apparently suggested by learned counsel for the appellant is tantamount to imposing on the respondent an obligation that is impossible to perform. As a wholly owned subsidiary company, the respondent has no control nor can it possibly have any influence over the shareholders of its holding company Brisdale Holdings Bhd. a public company. Such condition is also caught by s. 37 of the Contracts Act which makes an agreement contingent on an impossible event void. It is not therefore the intention of the parties to have such an ineffective and unenforceable clause incorporated in the agreement. In any event even if it is a valid undertaking in the sense suggested, a breach of such undertaking would still nullify the contract as the condition precedent is not fulfilled. There is thus no merit in the appellant's claim for breach of undertaking which should also be dismissed.

In conclusion and for the reasons stated the respondent's cross-appeal is allowed with costs. The High Court order is set aside and instead the respondent's claim for the declaration in prayer (a) is granted and the appellant is ordered to refund all monies paid with interest and costs. The appellant's appeal is accordingly dismissed.

*** Civil Appeal No. W-02-178-2001 – the Second Appeal**

Unlike the first appeal, in the second appeal the only real issue is whether the failure of the appellant to obtain a loan to pay the balance of the purchase price due to prevailing financial uncertainty and Bank Negara restriction on lending was a supervening event that could render the contract frustrated and void under s. 57 of the Contracts Act. Having had the advantage of reading the draft judgment of my learned brother, the Chairman of this panel, I fully concur with him. I agree that the appeal should be dismissed with costs.

* *[Editor's note: Case report and judgment by Abdul Kadir Sulaiman JCA on this appeal at p 238]*